a citizen of the State of Pennsylvania and resides at Valley View, in said State. Said R. R. Updegrave, at the time of his death, was a citizen of the State of Pennsylvania and resided at Valley View, in said State.

10. Defendant, Margaret Wilkinson, is administratrix d. b. n. c. t. a. of the estate of B. C. Guldin, deceased, and is a citizen of the State of Pennsylvania and resides at Minersville, in said State. Said B. C. Guldin, at the time of his death, was a citizen of the State of Pennsylvania and resided at Minersville, in said State.

11. The ground upon which the jurisdiction of this Court is invoked is diversity of citizenship between the parties hereto and the amount of controversy herein exceeds $3000, exclusive of interest and costs.

12. On or about July 15, 1919, there was in existence a corporation known as The Coombe Garment Company, organized and existing under the laws of the State of Pennsylvania, with an office and place of business at 1046 South Fifty-eighth Street, Philadelphia, Pa. Said corporation between July 15, 1919, and September 27, 1919, liquidated its business and distributed its assets as liquidating dividends to its stockholders. The names of the stockholders as of those dates, the percentage of their holdings to the entire amount of stock issued and outstanding, and the amount received by each of said stockholders in liquidation are as set forth in the following table:

Name of Stockholder	Percentage of Stockholdings	Amount Received in Liquidation
B. C. Guldin	20	$9,211.68
I. L. Phillips	25	11,514.60
F. J. Noonan	5¼	2,418.07
[fol. 8]		
C. S. Parmley	5¼	2,418.07
C. H. Parnell	2	921.16
Effie E. Scott	8¾	4,030.11
Max Phillips	13⅛	6,045.16
I. A. Coombe	2⅝	1,209.02
T. H. Coombe	5	2,302.92
R. R. Updegrave	9	4,145.25
Roy Updegrave	4	1,842.34

Wherever the above names have appeared in this bill, the persons referred to are one and the same.

13. Said F. J. Noonan, one of the above-named stockholders, died May 7, 1922, a citizen and resident of Mahanoy City, State of Pennsylvania. His widow, Mary L. Noonan, was appointed administratrix of his estate by the Register of Wills of Schuylkill County, Pennsylvania. She duly filed her first and final account as said administratrix, which was audited and distribution decreed and made in accordance with the laws of Pennsylvania thereunto applicable and she was discharged as administratrix on or about October 6, 1924. By virtue of the said facts, plaintiffs aver that no recovery can be had on account of the stock held by or liquidating dividend paid to said F. J. Noonan.

14. In February, 1925, the United States Commissioner of Internal Revenue assessed against said The Coombe Garment Company, an additional income and profits tax for the year 1918 of $277.75, and in December, 1924, assessed against said The Coombe Garment Company, an additional income and profits tax for the year 1919 of $9124.68. The amount of $96.07 of the additional tax assessed against the corporation for 1918 was paid by the corporation, leaving $9306.36 unpaid tax due from the corporation for the years involved. On or about June 16, [fol. 9] 1926, the Commissioner of Internal Revenue proposed for assessment against said I. L. Phillips, as one of the transferees of the assets of The Coombe Garment Company, the said sum of $9306.36, representing unpaid income and profits taxes assessed against that company for the years 1918 and 1919. The proposed assessment was based upon section 280 of the Revenue Act of 1926 (26 U. S. C. A., sec. 1069).

15. Plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips (together with Arthur L. Phillips, now deceased) executors under the will of I. L. Phillips, deceased, petitioned the United States Board of Tax Appeals for a redetermination of the alleged deficiency tax and prosecuted their claim for a redetermination to the Second Circuit Court of Appeals and the United States Supreme Court. Their position was that The Coombe Garment Company was not liable for the tax in question; that their decedent, I. L. Phillips, as a transferee of the assets of The Coombe Garment Company, was not liable to pay the same because the transferee proceedings against him were un-

constitutional, and that if there was liability it was only in proportion to his stockholdings. Judgment finally went against the contention of said plaintiffs and the reasons therefor are expressed in the opinion of the United States Supreme Court reported at 283 U. S. 589.

16. The amount of the judgment finally rendered in favor of the Government and against plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips (together with Arthur L. Phillips, now deceased) executors under the will of I. L. Phillips, deceased, was, including interest and certain of the costs, the sum of $12,340.10. The amount of disbursements in connection with the said proceedings totaled the sum of $1369.53. The aggregate of all legal fees paid to the date of the judgment in connection with the [fol. 10] said proceedings was the sum of $2000, making a grand total of $15,709.63.

17. The stock of The Coombe Garment Company, held in the name of I. L. Phillips and Max Phillips, respectively, at the time of its liquidation in 1919, was wholly owned by plaintiff, Phillips-Jones Corporation. Said I. L. Phillips and Max Phillips were merely nominal holders and held all of the stock registered in their names for the use and benefit of plaintiff, Phillips-Jones Corporation. The liquidating dividends received by I. L. Phillips and Max Phillips, as stated in paragraph 12 hereof, were forthwith paid over by them to plaintiff, Phillips-Jones Corporation, the real owner of the stock held in those names. Said plaintiff, Phillips-Jones Corporation, paid all of the amounts hereinbefore set forth, namely, the judgment, disbursements and legal fees, totaling $15,709.63, on the following dates:

	Amount	Date Paid
Judgment of	$12,340.10	August 17, 1931
Disbursements of	1,369.53	March 28, 1928, to October 1, 1931
Legal fees of	2,000.00	August 2, 1930, to October 1, 1931

18. Said The Coombe Garment Company has not had any property or assets and has not transacted any business since September 30, 1919, when, as above stated, it completed the distribution of all of its property and assets to its stockholders. It has no means of paying any of the

amount paid by plaintiff, Phillips-Jones Corporation, as hereinbefore stated.

19. Plaintiff, Phillips-Jones Corporation, has made demand upon all of the defendants for the payment to it of their respective contributive shares to reimburse it for the sum paid in excess of its proper share of said additional tax. [fol. 11] All of the defendants have failed, neglected and refused to contribute to said plaintiff, Phillips-Jones Corporation.

20. Plaintiff, Phillips-Jones Corporation, has no knowledge of the means or financial responsibility of the defendants and has no knowledge of their respective ability to pay their contributive shares.

Wherefore, plaintiffs ask for equitable relief, as follows:

(a) That the duty of the several defendants to contribute to plaintiff shall be decreed.

(b) That the several defendants shall be directed and ordered to make discovery of their financial responsibility sufficiently to determine whether or not each of them is able to make contribution and the extent thereof.

(c) That the Court shall order and decree the amount, or amounts, to be paid to plaintiff, Phillips-Jones Corporation, by each of the defendants.

(d) Such other and further relief as may be proper in the premises.

Ulric J. Mengert, Montgomery & McCracken, Attorneys for Plaintiffs.

[fol. 12] *Duly sworn to by Louis J. Treuhoft. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

ANSWER OF C. S. PARMLEY, DEFENDANT, TO AMENDED BILL OF COMPLAINT—Filed April 25, 1935

Charles S. Parmley, one of the defendants in the above-captioned proceedings, reserving to himself all manner and right of exception to the amended bill of complaint, for

answer to said amended bill of complaint or to so much thereof as said defendant is advised it is necessary or material for him to make answer unto, answering, says:

1. Defendant admits the averment contained in the first paragraph of plaintiffs' amended bill of complaint.

2. Defendant denies any knowledge as to any of the allegations contained in the second paragraph of plaintiffs' amended bill of complaint.

3. Defendant admits the averment contained in the third paragraph of plaintiffs' amended bill of complaint.

4. Defendant denies any knowledge as to any of the allegations contained in the fourth paragraph of plaintiffs' amended bill of complaint.

5. Defendant denies any knowledge as to any of the allegations contained in the fifth paragraph of plaintiffs' amended bill of complaint.

6. Defendant denies any knowledge as to any of the allegations contained in the sixth paragraph of plaintiffs' amended bill of complaint.

7. Defendant admits the averment contained in the seventh paragraph of plaintiffs' amended bill of complaint.

[fol. 14] 8. Defendant denies any knowledge as to any of the allegations contained in the eighth paragraph of plaintiffs' amended bill of complaint.

9. Defendant denies any knowledge as to any of the allegations contained in the ninth paragraph of plaintiffs' amended bill of complaint.

10. Defendant denies any knowledge as to any of the allegations contained in the tenth paragraph of plaintiffs' amended bill of complaint.

11. Defendant admits the diversity of citizenship but denies any knowledge as to the allegation contained in the eleventh paragraph of plaintiffs' amended bill of complaint relative to the amount in controversy. As to said allegation defendant demands proof that said amount in controversy exceeds three thousand dollars, exclusive of interest and costs.

12. Defendant admits the averment that in 1919, Coombe Garment Company liquidated its business and distributed

to him, as owner of 5¼ per cent. of the stock of Coombe Garment Company, a liquidating dividend of $2418.07 as set forth, inter alia, in the twelfth paragraph of plaintiffs' amended bill of complaint. Defendant denies any knowledge as to the other allegations contained in said paragraph and demands proof thereof, if they be material.

13. Defendant admits that F. J. Noonan, one of the stockholders of Coombe Garment Company, died in May, 1922, a citizen and resident of Mahanoy City, State of Pennsylvania; also that his widow, Mary L. Noonan, was appointed administratrix of his estate and duly filed her first and final account as administratrix, which account was audited and distribution decreed and made in accordance with the laws [fol. 15] of Pennsylvania, and further that the said Mary L. Noonan was discharged as administratrix on or about October 6, 1924. Defendant avers that the other allegations made by plaintiffs in paragraph 13 of the amended bill of complaint set forth conclusions of law which, in view of the facts hereinafter set forth, are irrelevant and immaterial.

14. Defendant denies any knowledge as to any of the allegations contained in the fourteenth paragraph of plaintiffs' amended bill of complaint. As to said allegations, defendant demands proof.

15. Defendant admits the averments contained in the fifteenth paragraph of plaintiffs' amended bill of complaint as to the appeal prosecuted to the Supreme Court of the United States, reported in 283 U. S. 589.

16. Defendant admits that judgment was finally rendered in favor of the Government and against plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips (together with Arthur L. Phillips, now deceased), executors under the will of I. L. Phillips, deceased, in the sum of $12,340.10. Defendant denies any knowledge as to the amount of disbursements in connection with said proceedings and as to legal fees paid to the date of the judgment and, therefore, demands proof of the amount of said disbursements and legal fees, if proof of said allegations be material.

17. Defendant denies any knowledge as to any of the allegations contained in the seventeenth paragraph of plain-

tiffs' amended bill of complaint and demands proof thereof, if proof of said allegations be material. Defendant avers that the relations existing between I. L. Phillips, Max Phillips and Phillips-Jones Corporation at the time of liquidation of Coombe Garment Company in 1919 and subsequently [fol. 16] thereto are irrelevant and have no bearing on the issue raised by the present proceedings. On the contrary, defendant avers that, inasmuch as the Government's claim for unpaid taxes under Section 280 (1) can be collected only from a transferee who has received property from the corporation, said Government's claim could only exist against I. L. Phillips and/or Max Phillips, and any right to contribution from defendant must depend upon the successful prosecution of the Government's claim against either or both of said persons and his or their satisfaction of the Government's claim in said proceedings. As stated above, all the allegations made in paragraph 17 of plaintiffs' amended bill of complaint having to do with payments by Phillips-Jones Corporation of the amount of the judgment, disbursements and legal fees due by Coombe Garment Company are irrelevant and, for the reasons hereinafter set forth, have no bearing on the present proceedings.

18. Defendant admits the averment contained in the eighteenth paragraph of plaintiffs' amended bill of complaint.

19. Defendant admits that on or about November 17, 1931, plaintiff made demand upon him for payment of his alleged contributive share to reimburse plaintiff for the alleged excessive share of the tax paid by plaintiff, Phillips-Jones Corporation. Defendant admits that, for the reasons hereinabove and hereinafter set forth, he has failed, neglected and refused to contribute to the plaintiff corporation.

20. Defendant admits that plaintiff corporation has no knowledge of the means or financial responsibility of the defendants and that plaintiff corporation has no knowledge of the ability of the respective defendants to pay their contributive shares.

[fol. 17] For a separate and affirmative defense, the defendant, C. S. Parmley, alleges:

21. That the plaintiff, Phillips-Jones Corporation, was under no legal obligation to pay the amount of the tax as-

sessed against Coombe Garment Company inasmuch as it was not a stockholder of Coombe Garment Company and did not receive from Coombe Garment Company a liquidating dividend in excess of the amount of the tax. Said plaintiff corporation was not a transferee within the meaning of Section 280 (a) (1) of the Revenue Act of February 26, 1926, Chapter 27, and consequently could not be compelled to pay the amount of the tax assessed against the Coombe Garment Company. Defendant avers that if the amount of said tax, plus legal fees and costs, was paid by plaintiff corporation as averred in the seventeenth paragraph of plaintiffs' amended bill of complaint, plaintiff corporation is a mere volunteer and, as such, is not entitled to contribution from defendants.

22. That the plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, are not entitled to contribution inasmuch as their decedent, I. L. Phillips, did not pay the amount of the tax assessed against Coombe Garment Company. Said plaintiff-executors are entitled to contribution only if their decedent was obliged to pay more than his proportionate share of the tax, and, having paid no portion of the tax, are entitled to no contribution.

23. That it was the duty of I. L. Phillips, when notified of the proposed assessment of the full amount of the tax against him on or about June 16, 1926, to notify immediately all stockholders receiving a liquidating dividend of the [fol. 18] proposed assessment and of the possibility of their being compelled to respond in their respective shares in order to afford to said stockholders an opportunity to participate in the defense of the Government's claim. That the said I. L. Phillips, not having done this, is not entitled to contribution from the defendants, and, inasmuch as the rights of plaintiff corporation can in no event rise higher than those of I. L. Phillips, plaintiff corporation is likewise not entitled to contribution.

24. That, for the reasons given above and for other good and sufficient reasons, neither I. L. Phillips, the personal representatives of I. L. Phillips, nor the plaintiff corporation is entitled to contribution from the respective defendants, by reason of the facts set forth in plaintiffs' amended bill of complaint.

Wherefore, the defendant, Charles S. Parmley, prays that this Honorable Court dismiss the amended bill of complaint, with his reasonable costs and charges in this behalf most wrongfully sustained.

John C. Noonan, Attorney for C. S. Parmley, Defendant.

IN UNITED STATES DISTRICT COURT

ANSWER OF EFFIE E. SCOTT—Filed April 29, 1935

To the Honorable, the Judges of Said Court:

The defendant, Effie E. Scott, answering the amended bill of complaint herein says:

1. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 1 of the amended bill of complaint [fol. 19] are true, and demands proof thereof if material.

2. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 2 of the amended bill of complaint are true, and demands proof thereof if material.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted, except that the residence of said T. H. Coombe is said to be in Philadelphia, Pennsylvania.

8. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 8 of the amended bill of complaint are true, and demands proof thereof if material.

9. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 9 of the amended bill of complaint are true, and demands proof thereof if material.

10. Admitted, as to the late citizenship and residence of B. C. Guldin, deceased; defendant has no knowledge,

and after reasonable investigation is unable to ascertain whether or not the remaining facts alleged in paragraph 10 of the amended bill of complaint are true, and demands proof thereof if material.

11. Defendant admits the amount in controversy herein exceeds $3000 exclusive of interest and costs. Defendant [fol. 20] admits that the ground upon which the jurisdiction of this Court is invoked is the alleged diversity of citizenship between the parties hereto.

12. Defendant admits that on or about July 15, 1919, there was in existence a corporation known as "The Coombe Garment Company" organized and existing under the laws of Pennsylvania, and that said corporation between July 15, 1919 and September 27, 1919, liquidated its business and distributed its assets as liquidating dividends to its stockholders. Defendant admits that she was the owner of 8¾ per cent. of the issued and outstanding stock of said corporation, and that she received in liquidation $4030.11. As to the other averments of paragraph 13 of the amended bill of complaint, defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged are true, and demands proof thereof if material.

13. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 13 of the amended bill of complaint are true, and demands proof thereof if material. Defendant further avers that the statement contained in the last sentence of said paragraph is a conclusion of law, and does not require an answer on the part of this defendant.

14. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 14 of the amended bill of complaint are true, and demands proof thereof if material.

15. Defendant admits that the persons named in paragraph 15 of the amended bill of complaint petitioned the United States Board of Tax Appeals for a redetermination [fol. 21] of the alleged deficiency tax, and prosecuted their claim for a redetermination in the Second Circuit Court of Appeals and the United States Supreme Court, and that

judgment was finally entered against the persons named in paragraph 15 of the amended bill of complaint. Defendant has no knowledge, and after reasonable investigation, including interviews with or attempts to interview an official, certain stockholders, and the accountant for the company, and examination of the decisions in the matter, is unable to ascertain the position or contentions of the said parties in said proceedings, and demands proof thereof if material, but defendant is informed, believes and therefore avers, as more fully hereinafter stated, that plaintiffs did not contest the liability of The Coombe Garment Company, transferor, on the merits.

16. So far as costs, disbursements and fees are concerned, defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 16 of the amended bill of complaint are true; furthermore, means of proof of the same are under the exclusive control of plaintiffs, and defendant demands proof thereof if material.

17. Defendant avers that she has no knowledge of the facts alleged in paragraph 17 of the amended bill of complaint, and that means of proof of the same are under the exclusive control of plaintiffs, and demands proof thereof if material.

18. Admitted.

19. Defendant admits that she has refused to contribute to the plaintiff, Phillips-Jones Corporation Defendant denies that any demand had been made upon her for the payment of her alleged contributive share prior to March 21, 1933, except as hereinafter stated. As to the other [fol. 22] facts alleged in paragraph 19 of the amended bill of complaint, defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not such facts are true, and demands proof thereof if material.

20. Means of proof of the facts alleged in paragraph 20 of the amended bill of complaint are under the exclusive control of the plaintiffs, and defendant demands proof thereof if material.

And for a further and affirmative defense to the plaintiffs' claim, the defendant, Effie E. Scott, alleges:

21. That notwithstanding the alleged facts as set forth in paragraph 14 of the amended bill of complaint to the effect that assessments against The Coombe Garment Company were made in December, 1924, and February, 1925, and an assessment against said I. L. Phillips on or about June 16, 1926, and that, as alleged in paragraph 15 of the amended bill of complaint, the executors petitioned the United States Board of Tax Appeals for a redetermination of the alleged deficiency tax, and that said Board handed down a decision on April 2, 1929 (15 B. T. A. 1218), and that an appeal was then taken to the Second Circuit Court of Appeals where a decision was handed down on June 9, 1930 (42 Fed. 2d 177), defendant was not informed as to the existence of the assessment against said I. L. Phillips, or the prosecution of the litigation, or given an opportunity to defend the same or to pay, as she might determine, until on or about July 30, 1930, when she received a letter from one Herman Goldman claiming to represent the executors of the estate of Isaac L. Phillips, setting forth the alleged history of the litigation to that date and requesting an expression of defendant's wishes as to the prosecution of an appeal to the United States Supreme Court.

[fol. 23] 22. That the decision of the Board of Tax Appeals and consequently of the Appellate Courts, was based upon a stipulation of facts, the contents whereof are unknown to deponent, and if material she prays discovery thereof, which stipulation of facts was agreed to by the executors of the estate of I. L. Phillips or their counsel without notice to or the knowledge or consent of defendant, thus prejudicing defendant's position by depriving her of an opportunity to contest the facts upon which the Government based its claim of tax liability.

23. That the failure of I. L. Phillips and the plaintiffs to notify defendant of the existence of the assessment against them and of the circumstances in connection therewith until July 30, 1930, the date of said Herman Goldman's letter, prejudiced defendant in that defendant is informed, believes and therefore avers that certain of the other stockholders of The Coombe Garment Company who were living and/or solvent in the years 1924, 1925 and 1926, thereafter and prior to July 30, 1930 either became in-

solvent or financially embarrassed or died, and their estates were, became or are insolvent or were disposed of by distribution; that defendant has no means of knowledge as to all of the material facts alleged in this paragraph, and therefore, for the purposes of this averment, joins in the prayer of the amended bill of complaint for discovery as to the financial responsibility on July 30, 1930 and subsequently thereto of the several stockholders who received liquidating dividends and their estates.

24. That the said actions of plaintiffs have subjected defendant, if liable, without notice or knowledge or consent on her part, to large additional claims for interest, expenses and costs of litigation incurred in the prolonged [fol. 24] defense to the claim of the Government.

25. That plaintiff corporation was not a stockholder of The Coombe Garment Company, and was not liable to pay taxes assessed against it, and was not assessed directly as a transferee of its assets, and consequently paid the taxes in question as a mere volunteer.

26. That defendant is informed, believes and therefore avers that I. L. Phillips or someone acting on behalf of him or of the plaintiffs, without notice to or knowledge or consent of defendant on or about February 9, 1924 executed a waiver on behalf of The Coombe Garment Company waiving the Statute of Limitations in respect of a portion of the alleged tax liability.

27. The defendant is informed, believes and therefore avers that in the litigation aforesaid the plaintiffs failed to present such defenses as were available to The Coombe Garment Company and failed to contest the validity or amount of the assessment against The Coombe Garment Company, but defended on other grounds.

Wherefore, defendant prays that she may be hence dismissed with her costs in this behalf sustained.

And she will ever pray.

Effie E. Scott. Philip Wallis, Attorney for Defendant, Effie E. Scott.

[fol. 25] *Duly sworn to by Effie E. Scott. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AMENDED BILL OF COMPLAINT—Filed May 11, 1935

And Now, to wit, May 11, 1935, P. B. Roads, attorney for Margaret Wilkinson, administratrix d. b. n. c. t. a. of the state of B. C. Guldin, deceased, one of the defendants above named, hereby moves the Court to grant a rule on Phillips-Jones Corporation, individually, and Annie G. Phillips, Seymour J. Phillips, and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, plaintiffs above named, to show cause why the amended bill of complaint filed should not be dismissed for the following matters appearing upon the face of the record, to wit:

[fol. 26] (1) An inspection of said amended bill of complaint filed shows that the United States Commissioner of Internal Revenue assessed against said I. L. Phillips, as one of the transferees of the assets of the Coombe Garment Company, the sum of nine thousand three hundred six dollars and thirty-six cents ($9,306.36), representing unpaid income and profits taxes assessed against that company for the years 1918 and 1919. But it is neither alleged nor shown that either the said I. L. Phillips or the said Annie G. Phillips, Seymour J. Phillips, and Abraham S. Phillips, surviving executors under the will of the said I. L. Phillips, deceased, paid the said sum of $9,306.36, or any part thereof, and further, that the judgment finally rendered against said executors under the will of the said I. L. Phillips, deceased, upon said assessment by the United States Commissioner of Internal Revenue, including interest and certain of the costs, in the sum of twelve thousand three hundred forty dollars and ten cents ($12.340.10), was paid voluntarily and not under compulsion by the said Phillips-Jones Corporation.

(2) It is nowhere alleged nor shown in said amended bill of complaint, inter alia, that the said Margaret Wilkinson, individually, or that the said B. C. Guldin, his heirs, executors or administrators, or assigns, received notice that the United States Commissioner of Internal Revenue had made the said assessment against the said I. L. Phillips as one of the transferees of the assets of the

Coombe Garment Company, representing unpaid income and profits taxes assessed against that company for the years 1918 and 1919, in time to make a defense thereto and protect the interests of the said B. C. Guldin, his heirs, executors, administrators, or assigns, before the said assessment had been litigated to final judgment in favor of [fol. 27] the United States Commissioner of Internal Revenue and against the executors of the estate of the said I. L. Phillips, deceased.

(3) It is nowhere averred in said amended bill of complaint that the said B. C. Guldin or either or any of his heirs or representatives or assigns agreed to pay all or pay any part of the said assessment made by the United States Commissioner of Internal Revenue against the said I. L. Phillips, or any of the costs, expenses, or fees attendant upon the litigation instituted by the executors of the said I. L. Phillips, deceased, in defense of and to prevent the collection of the said assessment by the United States Commissioner of Internal Revenue.

P. B. Roads, Attorney for Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased, One of the Defendants Above Named.

[fol. 28] IN UNITED STATES DISTRICT COURT

Argued March 20, 1936

OPINION SUR MOTION TO DISMISS BILL—Filed April 16, 1936

DICKINSON, J.:

Leave was granted to file Supplemental Briefs. These have now been received.

This case has unusual features. The Coombe Garment Company was a Pennsylvania corporation. In July or September 1919 it wound up its affairs and distributed its assets among its stockholders. This would seem to have been wholly the act of its stockholders. There was no winding up of its affairs and dissolution of the corporation by judicial decree is provided by the Pennsylvania Statutes. Act of April 9th, 1856, P. L. 293

Stock of the company stood in the name of I. L. Phillips. This stock really belonged to the Phillips-Jones Corporation. Incidentally the name of the plaintiff corporation suggests that Phillips was likewise interested in it. The defendants were also stockholders of the Coombe Company. Of the stock of the latter Phillips held 25 per cent and was its largest stockholder. We may take it for granted that all the indebtedness of the Coombe Corporation so far as acknowledged by it was paid before distribution of its assets. The United States, however, had a claim for "additional income and profits tax". for the years 1918 and 1919. No additional tax was however assessed or levied until December 1924 and February 1925 against [fol. 29] the corporation. On June 16th, 1926 an assessment was made against I. L. Phillips as a "transferee of the assets of the Coombe Company". This assessment was made by authority of Section 280 of the Revenue Act of 1926, 26 U. S. C. A. Section 1069. No explanation appears of why the assessment was made against Phillips alone. The sum assessed was $9306.36. The dividend he had received from the Coombe Company was $11,514.60. No notice was given to the other stockholders. Phillips resisted the lawfulness of the assessment against him, carrying his resistance to the Supreme Court. The Court gave a ruling against him.

Phillips et al. Executors, v. Commissioner Internal Revenue, 283 U. S. 589.

Thereupon the Phillips-Jones Company paid the assessment. The judgment paid August 31st, 1931 was $12,340.10. In addition to this they made disbursements for counsel fees &c. of $3369.53. It does not appear why the Phillips-Jones Corporation paid this judgment other than it is averred that the stock which stood in the name of I. L. Phillips belonged to the corporation. Demand was made upon defendants for contribution. All the stockholders other than I. L. Phillips were made defendants in the present Bill except F. J. Noonan and Max Phillips. It is explained that Noonan was not made a defendant because he was deceased and his estate settled. It is not explained why Max Phillips was not made a defendant unless the name suggests the reason or more probably making him a defendant would have ousted this Court of jurisdiction of the cause.

The demurrer, as a motion to dismiss is, sets out three grounds of demurrer.

1. I. L. Phillips did not pay the assessment sought to be recovered by the defendants and the payment thereof was a [fol. 30] voluntary payment by the Phillips-Jones Corporation which gave it no claim to contribution.

2. The defense had no notice of the assessment against Phillips nor any opportunity to defend thereto.

3. There is no averment of any promise by the defendants to pay any part of the assessment against Phillips.

Discussion

This is a claim for contribution. The plaintiff had assessed against him a tax for which he was no more liable than other stockholders. There is a more or less loose idea of what is fair which calls upon the others to contribute their just share of a tax burden which any of them might have been called upon to pay, limited only by what they had received of the assets of the corporation of which they were all stockholders. A Court however can impose upon them only the legal or equitable liability which they have incurred.

There are standards by which we can measure and appraise the liability for which the law calls. There is no standard of what is fair and right from the ethical viewpoint. Some might think that there is nothing fair nor right in calling upon stockholders to pay additional taxes assessed against a corporation five years after taxes had been assessed against it and paid and five years after its affairs had been wound up and its assets distributed on the assumption that the payment of the taxes which had been assessed against it, paid its taxes in full nor is there anything fair or right in exacting payment of one stockholder instead of all. The Court has nothing to do with what is fair and right in the ethical sense. The question is what is the law?

We start with the proposition that the stockholders were under no legal obligation to pay the taxes of the corporation. [fol. 31] The liability is one imposed upon them by the strong arm of the law. The law, it is true, requires of them only to pay out of the assets of the corporation in which they have shared. This, however, is merely the motive for the imposition.

The legal liability rests solely upon the assessment. Phillips was bound to pay the tax because it was assessed against him. No tax was assessed against the defendants and hence

none of them were legally bound to pay. That is not the ground upon which their liability is placed. The ground is that Phillips paid the whole tax; that there was the same reason for assessing the others which there was for assessing him, and the ergo is that the others should reimburse him to the extent of their proportionate shares.

We accept the equitable doctrine relied upon by the plaintiff that when one is forced to pay a debt owing by himself and others he has a legal right to enforce contribution. The basis of it however is the debt obligation of the contributors. Here there is no debt obligation and hence no legal obligation to contribute. The most which can be said, and all which is averred in this Bill is that the tax which was assessed against Phillips might have been assessed against the defendants. Conceding that it might, the fact remains that it was not assessed. Neither the possibility nor liability to assessment imposed the tax. It was imposed wholly by the assessment and imposed upon Phillips alone. This was his misfortune. It may be and doubtless is true that he might have demanded that the tax be assessed against all. If it had been each would have been liable in solido for the whole up to what he had received from the corporation. If one had under compulsion paid the whole tax he could have enforced contribution from the others. Here, again, however, the demand would have rested [fol. 32] upon the debt obligation. None, we repeat, is averred in this Bill. Again, Phillips when he was assesed might have asked the others to agree that he should oppose the assessment on behalf of all and that the others would contribute. If they had so agreed there would have been a debt obligation. None however is averred.

An analogue is supplied by tort feasors whose negligence has contributed to an injury. Each is liable to the person injured and either may alone be made a defendant and compelled to pay the whole damage. This, it may be said, is not fair nor just. The law of Pennsylvania has recognized this and provided a remedy. Without it, however, the defendant sued would not have a legal right to contribution notwithstanding that it might well be said that he "ought" to be reimbursed. This is the claim presented by this Bill. The view taken renders it unnecessary to discuss the special grounds of demurrer.

A decree dismissing the Bill for want of equity may be submitted.

IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFFS FOR REHEARING—Filed May 11, 1936

To the Honorable O. B. Dickinson, Judge of the District Court, for the Eastern District of Pennsylvania:

The petition of the plaintiffs in the above-entitled cause respectfully represents:

1. The Amended Bill of Complaint herein filed avers that plaintiff, Phillips-Jones Corporation, had, as real owner, held stock in the name of I. L. Phillips (whose executors are also plaintiffs herein) in a certain corporation, namely, the [fol. 33] Coombe Garment Company, which owed corporate taxes to the United States after the said corporation had completed the distribution of all its property and assets to its stockholders. The United States enforced the liability of the said stockholder as a transferee of the assets of the corporation under Section 280 of the Revenue Act of 1926 and compelled the payment of the entire amount of said tax by plaintiffs herein. The relief sought is contribution from the other stockholders in proportion to the liquidating dividends received by them.

2. Answers were filed by defendants Parmley and Scott. A motion to dismiss the amended bill of complaint was filed by defendant Wilkinson, administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, which raised three questions, namely, (1) that Phillips-Jones Corporation made the payment, for which contribution was sought, voluntarily and not under compulsion, (2) that it was not averred that notice had been received by B. C. Guldin, his heirs, executors, administrators or assigns of the assessment against I. L. Phillips as transferee of the assets of the Coombe Garment Company, in time to make a defense thereto, and (3) that it was not averred in the amended bill of complaint that B. C. Guldin or his heirs, representatives or assigns had agreed to pay any part of the said assessment, or any of the costs, expenses or fees of the litigation by which the said assessment was registered. The other defendants did not enter any appearance or file any pleading and they are in default.

3. The said motion to dismiss the amended bill of complaint was argued before Honorable O. B. Dickinson on March 20, 1936, and under date of April 16, 1936, an opinion

was filed in which the motion to dismiss was treated as a demurrer and in which the conclusion was reached that there was no equity in the bill and that it should be dismissed. The [fol. 34] said opinion stated that since there was no equity in the bill, it was not necessary to discuss the special grounds of the demurrer.

4. It is apparent from the said opinion that this Court, in reaching its conclusion that there was no equity in the bill, took the ground that plaintiff could have compelled the United States to assess all of the stockholders in the corporation. The language used by this Court in its opinion is as follows: "It may be and doubtless is true that he (i. e. decedent Phillips) might have demanded that the tax be assessed against all. If it had been, each would have been liable in solido for the whole up to what he had received from the corporation. If one had under compulsion paid the whole tax he could have forced contribution from the others."

Petitioners respectfully submit that this Court proceeded upon a misconception of the law. The United States Supreme Court, when it sustained the assessment against decedent Phillips, clearly stated that it was not open to him under the summary proceeding provided for by Section 280 of the Revenue Act of 1916 to bring in the other stockholders. The opinion of the Supreme Court was written by Mr. Justice Brandeis, who said (Phillips v. Commissioner, 283 U. S. 589, at p. 603):

"Such rule of convenience (i. e., bringing in other stockholders or transferees by a cross bill) is not applicable in summary administrative proceedings like that provided by sec. 280 (a) (1)."

It is submitted that this Court failed to distinguish between the remedy that was open to said I. L. Phillips in an equity proceeding and the absence of that remedy in the summary proceeding whereby the Government compelled the [fol. 35] payment of the tax in this case. The Supreme Court went on to say at pages 603-604:

"One who receives corporate assets upon dissolution is severally liable, to the extent of assets received, for the payment of taxes of the corporation; and other stockholders or transferees need not be joined. Non-joinder cannot

affect or diminish the several liability of the stockholder or transferee sued. Compare Benton v. American National Bank, 276 Fed. 368. The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders. There is nothing in sec. 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided."

It is obvious that this Court did not realize that the summary proceeding invoked by the United States deprived Phillips of the right to bring in the other stockholders by cross bill. The effect of the decision of the United States Supreme Court is that a transferee who is assessed must pay and must thereafter pursue his remedy against the other stockholders for contribution. That is precisely what has been done in this case.

5. This Court in its opinion stated that this case was analogous to that of joint tort feasors among whom at common law there was no equity of contribution. Therefore, this Court concluded that there was no equity of contribution among stockholders, to whom all of the assets of a corporation have been distributed, when one of those stock- [fol. 36] holders was compelled to pay a tax owing by the corporation for which all stockholders were ratably liable. It is respectfully submitted that there is an equity of contribution among stockholders in such a case. It has been so held by the Second Circuit Court of Appeals in the very litigation out of which this case arises: Phillips v. Commissioner of Internal Revenue, 42 F. (2d) 177. Judge Swan, who delivered the opinion of the Court in that case, said at page 180:

"There remains the question of the extent of the appellants' liability. They contend that it is limited to their decedent's pro rata share of the corporation's tax, while the Commissioner contends that each stockholder is severally liable up to the amount of the liquidating dividend he

received. The Commissioner's contention is correct. Bartlett v. Drew, 57 N. Y. 587, is precisely in point. This was an action in the nature of a creditor's bill brought by a judgment creditor of a New Jersey corporation, after the return of an execution unsatisfied, to reach money distributed by the corporation to Drew, a large stockholder and a resident of New York. Drew contended that the suit could not be maintained against him alone, but all stockholders must be brought in to the end that each might contribute his proportion to the payment of the plaintiff's debt. The court rejected this contention, saying:

"* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equi- [fol. 37] table contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities, that may exist between his debtors.' Page 589 of 57 N. Y."

6. This Court in its opinion stated: "It is not explained why Max Phillips was not made a defendant unless the name suggests the reason, or more probably making him a defendant would have ousted this Court of jurisdiction of the cause." In making that statement it is submitted that this Court overlooked the averments of paragraph 17 of the amended bill of complaint. It is there set forth that the stock of the Coombe Garment Company held in the name of I. L. Phillips and Max Phillips, respectively, at the time of its liquidation in 1919, was wholly owned by plaintiff, Phillips-Jones Corporation, and that the liquidating dividends received by said I. L. Phillips and Max Phillips were forthwith paid over by them to plaintiff, Phillips-Jones Corporation, which was the real owner of the stock held in those two names. Those averments make it clear that Max Phillips was under no obligation to plaintiffs because he had paid over to plaintiff, Phillips-Jones Corporation, the full amount of the liquidating dividend received by him immediately upon its receipt.

7. This Court treated the motion to dismiss filed by only one of the eight defendants as a demurrer, although Federal Equity Rule No. 29 abolishes demurrers. Under said Equity Rule 29, the only matters before the Court were the specific points of law raised by the motion to dismiss as they affected the one defendant filing the said motion. The grounds upon which this Court proceeded in its opinion were different from the points of law which were raised in the said motion to dismiss. By deciding the case upon [fol. 38] grounds not raised by any party the Court deprived the plaintiffs of a proper opportunity to be heard thereon.

8. Certain facts that would have been developed upon a hearing of this cause were treated by the Court as nonexistent. Thus, the opinion states: "No explanation appears of why the assessment was made against Phillips alone."

The facts are that the United States had made a demand upon all of the stockholders as early as 1925 or 1926, so that they were then all informed that the United States Government claimed that the said tax was due by the corporation and that the stockholders were liable to see that the United States was paid. However, none of the stockholders did pay. The simplest procedure for the United States was to proceed against the only stockholder receiving a large enough distribution to permit recovery of the entire amount from him, and the Government so proceeded. During the course of the litigation between the Government and the executors of I. L. Phillips, deceased, the latter communicated with the other stockholders and said stockholders had opportunity to participate in the litigation with the Government but were content not to do so.

The matters referred to in this paragraph of the petition would have been developed upon a hearing of the cause. We bring them to the attention of this Court in case the misunderstanding thereof, as indicated by language in the opinion filed, may have influenced the Court in reaching its conclusion.

Wherefore petitioners are aggrieved by the conclusion reached in the said opinion filed and pray for a rule to show cause why a rehearing of the cause should not be had so that the said matters may be fully presented and a decision

[fol. 39] arrived at in accordance with the law as laid down in the early litigation in this very case and in accordance with the facts thereof.

Ulric J. Mengert, Montgomery & McCracken, Attorneys for Plaintiffs. Louis J. Trenhaft.

Duly sworn to by Louis J. Trenhaft. Jurat omitted in printing.

[fol. 40] IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE—Filed May 11, 1936

And Now, this eleventh day of May, A. D. 1936, upon consideration of the foregoing petition of plaintiffs for a rehearing and upon motion of Ulric J. Mengert, of counsel for plaintiffs, a rule is entered upon the defendants to show cause why a rehearing of this case should not be had. Rule returnable the twenty-fourth day of June, 1936, at 10 o'clock A. M. D. S. T.

Upon the return of this rule counsel has leave to rediscuss the merits of the case.

By the Court.

(Sgd.) Dickinson, J.

IN UNITED STATES DISTRICT COURT

ANSWER OF MARGARET WILKINSON, ADMINISTRATRIX D. B. N. C. T. A. OF THE ESTATE OF B. C. GULDIN, DECEASED, ONE OF THE DEFENDANTS ABOVE NAMED, TO THE RULE ENTERED MAY 11, 1936, RETURNABLE JUNE 24, 1936, TO SHOW CAUSE WHY A REHEARING SHOULD NOT BE HAD—Filed June 24, 1936

To the Honorable O. B. Dickinson, Judge of the United States District Court for the Eastern District of Pennsylvania:

Your respondent, Margaret Wilkinson, administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, one of the defendants above named, reserving to herself the benefit of all manner of objections and exceptions, respectfully prays that the petition filed by the plaintiffs to show

cause why a rehearing should not be had, be dismissed and [fol. 41] the said rule entered thereon discharged, for the following reasons:

1. On April 16, 1936, an opinion was filed by your Honorable Court in which the motion of this respondent to dismiss plaintiffs' amended bill of complaint was allowed, and decreed that the said amended bill of complaint should be dismissed.

Said motion to dismiss plaintiffs' amended bill of complaint was based solely upon matters appearing upon the face of the record, in effect a demurrer to plaintiffs' bill and the issue was so confined, and the merits of plaintiffs' bill accordingly and consequently not before the Court nor a subject for the Court's consideration.

In the instant rule entered by the plaintiffs, the plaintiffs attempt therein and thereby to involve the merits of the case, a subject which was not and is not before the Court, as an inspection of the record will show.

Wherefore, there is no authority in law nor precedent for plaintiffs' instant rule to discuss the merits of the case, and the same should, therefore, be discharged.

2. The instant petition filed by the plaintiffs in this case does not disclose any error made by your Honorable Court in the decree dismissing plaintiffs' bill. Plaintiffs aver, inter alia (paragraph 7), "The grounds upon which this Court proceeded in its opinion were different from the points of law which were raised in the said motion to dismiss."

Your respondent avers that it is not material whether the Court based its decree upon the grounds mentioned in your respondent's motion to dismiss or upon other grounds. It is the plaintiffs' burden to show that the decree of the Court is not good.

[fol. 42] Wherefore, plaintiffs' petition and rule should be respectively dismissed and discharged.

3. Oral argument was had before your Honorable Court on the said motion to dismiss plaintiffs' amended bill, briefs duly filed by the petitioners and this respondent, during which time each of the contending parties had a full opportunity to be heard, and on April 16, 1936, your Honorable Court filed its opinion and decreed that the said motion to

dismiss should be allowed and plaintiffs' bill be dismissed.

An inspection of plaintiffs' petition will show, as recourse being had thereto will appear, that there is no averment that plaintiffs had no opportunity of presenting the alleged grounds contained in their said petition to the Court for the Court's consideration prior to the entering of its decree, nor is there any averment that the alleged grounds mentioned in plaintiffs' said petition were discovered after the entering of the said decree.

Wherefore, plaintiffs' petition should be dismissed and the rule discharged.

Margaret Wilkinson, Admx. d. b. n. c. t. a. of B. C. Guldin, by P. B. Roads, Her Attorney-in-fact.

[fol. 43] *Duly sworn to by P. B. Roads.. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR REARGUMENT—Filed July 7, 1936

Argued June 24, 1936

DICKINSON, J.:

July 6, 1936.

Leave was granted to file Supplemental Briefs. One on behalf of defendants has been delayed because of the illness of counsel. Inasmuch as the conclusion reached is in favor of the defendants, we see no reason to further withhold a ruling.

[fol. 44] We disposed of the motion to dismiss in the opinion filed. Nothing more is now called for than to state the conclusion reached that the motion for a re-argument be denied. The high opinion we have of the views of the experienced counsel for the plaintiff however induces us to depart from the usual course and to further discuss the merits of the Bill.

The petition for the re-argument so well summarizes the points made that we follow it.

1. The motion to dismiss includes what are really matters of defense. Because of this we did not discuss them. The motion however interposes what is really a demurrer to the Bill by raising the question of whether the Bill discloses

a cause of action cognizable in Equity. To this we limited the discussion. If the Bill does aver such cause of action it should not have been dismissed.

2. The opinion filed commented on the fact that other stockholders than Phillips might have been called upon to defend to the assessment against him. We expressed no opinion that the United States had no right to do what the Supreme Court has ruled it might do. The part of the opinion quoted in Paragraph 4 of the petition had a wholly different meaning than that ascribed to it. It was intended to emphasize that the obligation of a stockholder to pay the tax arose out of the assessment against him. If it had been assessed against all and one had paid contribution could have been enforced. The tax was not assessed against the defendants in this Bill and hence that ground for contribution does not exist. The plaintiff might, we still assume, have given notice of the proceeding against him for the tax and called upon the other stockholders to come in and defend or otherwise to contribute. This might or might not have been a ground for a demand for contribution. All the quoted part of the opinion means that this ground, good or bad, did not exist.

[fol. 45] 3. The analogue of tort feasors carries no such thought as that imputed to it. All which was meant was that there is not only a distinction but a difference between what may be thought to be what a party ought to do in the ethical sense and what he is bound to do by Law or Equity. It may be that these defendants "ought" to share the burden which plaintiff has carried but no Court can compel them to contribute unless they are under a legal or equitable obligation to do so.

4. We attach no importance to the averments of Paragraph 17 of the Bill. They are said to give precisely the same reasons for the omission to name Max Phillips which we assumed to exist. Whether we get them from Paragraph 17 or inferred them from the family name, we do not see makes any difference.

5. It is true that Equity Rule 29 "abolishes" demurrers. It is however also true that a Bill may be dismissed if it fails to disclose a cause of action. It is likewise true that such a motion raises a demurrer question and is in effect a demurrer. The motion to dismiss gave this ground among

others. We think the Court could dismiss the Bill on this ground alone.

6. We used the expression that no explanation of the assessment being against Phillips alone appeared. No one would hesitate to hazard a guess at the reasons for it. We do not see that this bears upon the ruling made.

7. We can understand that any one might think that all stockholders should contribute proportionately to the payment of this tax. We can enter into the feelings of the plaintiff that selecting Phillips from among all the stockholders and requiring him to pay the whole tax was an arbitrary and unjust act. The injustice of it however did not prevent the exaction from being made. The thought [fol. 46] that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay.

The motion for a re-argument is denied.

IN UNITED STATES DISTRICT COURT

DECREE—Filed July 27, 1936

And Now, July 27, 1936, this cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, namely: the amended bill of complaint herein shall be and the same is hereby dismissed for want of equity, with prejudice, and the defendants shall go hence hereof without day.

By the Court.

(Sgd.) Dickinson, J.

[fol. 47] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 27, 1936

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

Your petitioners, Phillips-Jones Corporation, individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, who are plaintiffs in the above-entitled cause, pray that they may be permitted to take an appeal from the decree entered in the above cause on the — day of July, 1936, to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignment of errors which is filed herewith, that a citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Third Circuit in accordance with the rules thereof.

Dated July 27, 1936.

Ulric J. Mengert, Attorney for Petitioners.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDERS ALLOWING APPEAL—Filed July 27, 1936

Before Dickinson, J.

And Now, July 27, 1936, on motion of counsel for Phillips-Jones Corporation, individually and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, it is

Ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit, from the decree entered herein on July 27, 1936, be and the same hereby is allowed, and it is further

Ordered that the bond on appeal be fixed at the sum of $250, and it is further

Ordered that a certified transcript of the record and proceedings upon which the decree appealed from was entered be transmitted to the United States Circuit Court of Appeals in accordance with the rules of court.

By the Court.

Dickinson, J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 27, 1936

Come now Phillips-Jones Corporation, individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree of this Court entered on the twenty-seventh day of July, 1936.

[fol. 49] 1. The Court erred in that part of its opinion filed April 16, 1936, which reads as follows:

"The legal liability rests solely upon the assessment. Phillips was bound to pay the tax because it was assessed against him. No tax was assessed against the defendants and hence none of them were legally bound to pay."

2. The Court erred in that part of its opinon filed July 6, 1936, which reads as follows:

"The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay."

3. The Court erred in directing that the amended bill of complaint should be dismissed for want of equity.

4. The Court erred in not denying the motion to dismiss the amended bill of complaint filed by defendant, Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the estate of B. C. Guldin, deceased.

5. The Court erred in entering the following decree:

"And Now, July 27, 1936, this cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, namely: The Amended Bill of Complaint herein shall be and the same is hereby dismissed for want of equity, with prejudice, and the defendants shall go hence hereof without delay."

Wherefore plaintiffs pray that the said decree may be reversed and for such other and further relief as to the Court may seem just and proper.

Ulric J. Mengert, Attorney for Plaintiffs.

Dated July 27, 1936.

[fol. 50] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed August 15, 1936

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits, to wit:

1. Docket entries.
2. Amended bill of complaint.
3. Answer of C. S. Parmley to amended bill of complaint.
4. Answer of E. E. Scott to amended bill of complaint.
5. Motion of Margaret Wilkinson, Administratrix, etc., to dismiss amended bill.
6. Opinion dismissing bill of complaint for want of equity.
7. Petition of plaintiffs for rehearing and order of Court granting rule to show cause thereon.
8. Answer of Margaret Wilkinson, Administratrix, etc., to petition for rehearing.

9. Opinion denying motion for reargument.
10. Decree dismissing bill of complaint.
11. Petition for appeal.
12. Assignment of errors.

[fol. 51] 13. Decree granting appeal.

14. Præcipe for transcript of record and acknowledgment, and return of service thereof.
15. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Third Circuit and to be filed in the office of the clerk of the Appellate Court on or before the fifth day of September, 1936.

Ulric J. Mengert, Attorney for Plaintiffs.

Dated August 15, 1936.

[fol. 52] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6216

[Title omitted]

REFERENCE TO ARGUMENT

And afterwards, to wit, the first day of December, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the second day of March, 1937, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6216

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, Seymour J. Phillips and Abraham S. Phillips, Surviving Executors under the Will of I. L. Phillips, Deceased, Plaintiffs-Appellants,

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. Coombe, Roy Updegrave, Alvaretta Updegrave, Administratrix of the Estate of R. R. Updegrave, Deceased, and Margaret Wilkinson, Administratrix, d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased, Defendants-Appellees

Upon Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Davis and Thompson, Circuit Judges

OPINION—Filed March 2, 1937

THOMPSON, J.:

This is an appeal from a decree of the District Court for [fol. 55] the Eastern District of Pennsylvania dismissing an amended bill of complaint in which the appellants prayed for a decree against the several appellees directing them to contribute their pro rata shares of a judgment collected from the appellants. The facts leading up to this suit are stated by Mr. Justice Brandeis in Phillips v. Commissioner, 283 U. S. 589, 591 as follows:

"In 1919, the Coombe Garment Company, a Pennsylvania corporation, distributed all of its assets among its stockholders, and then dissolved. Thereafter, the Commissioner of Internal Revenue made deficiency assessments against it for income and profits taxes for the years 1918 and 1919. A small part of these assessments was collected leaving an unpaid balance $9,306.36. I. L. Phillips of New York City,

had owned one-fourth of the company's stock and had received $17,139.61 as his distributive dividend. Pursuant to Section 280 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61, the Commissioner sent due notice that he proposed to assess against, and collect from, Phillips the entire remaining amount of the deficiencies. No notice of such deficiencies was sent to any of the other transferees, and no suit or proceedings for collection was instituted against them."

The Supreme Court sustained the right of the Commissioner to collect the entire deficiency through summary proceedings from Phillips alone. It did not, however, rule upon the right of Phillips to obtain contributions from the other stockholders. That is the question before us.

The right to contribution is of necessity dependent upon a prior determination that the appellees are liable for the corporation deficiency tax. It was unsuccessfully argued to the Supreme Court that Phillips should not be solely liable for the entire sum of the deficiency. The inequity to Phillips is not without justification. The decisions pro- [fol. 56] vide that the Commissioner may assess a tax in the summary fashion provided for by the 1926 Act; by a bill in equity, as in Leighton v. United States, 289 U. S. 506; or by an action at law, as in the cases cited in note 2 in Phillips v. Commissioner, supra. Phillips had the right to contest, and his executors did, in fact, contest the assessment before the Board of Tax Appeals, the Circuit Court of Appeals and the Supreme Court, with the Commissioner at all times a party litigant. Phillips' executors would have had an opportunity to contest had the Commissioner initiated proceedings against them by a bill in equity or by an action at law. The contentions of the appellants, however, if sustained, would deprive the appellees of a similar right. Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a

decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established.

The decree of the District Court dismissing the bill in equity is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 57] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1936

No. 6216

Phillips-Jones Corp. et al., Appellants,

v.

C. S. Parmley et al., Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

Judgment—Filed March 2, 1937

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, March 2, 1937.

J. W. Thompson, Circuit Judge.

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,503. U. S. Circuit Court of Appeals, Third Circuit. Term No. 45. Phillips-Jones Corporation, Individually, and Annie G. Phillips, et al, petitioners, vs. C. S. Parmley, C. H. Parnell, Effie E. Scott, et al. Petition for a writ of certiorari and exhibit thereto. Filed May 7, 1937. Term No. 45, O. T., 1937.